

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:SB:3:JAX:1:TL-N-536-01  
JCWinkler

date:

to: Ted Brown, Area Director

from: JUDITH C. WINKLER  
Senior Attorney (SBSE)

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subject: [REDACTED] - § 6700

The participants at the conference on March 12, 2001, requested legal advice from this office on the following two issues:

1. Whether the Service is required to permit members of the press (possibly with television cameras) into an interview with a taxpayer if the taxpayer requests that the members of the press accompany him to the meeting.

2. Whether the Service is required to meet with an abusive tax shelter promoter in a § 6700/7408 investigation before sending the case to the Department of Justice.

Facts

[REDACTED] asserts that Code § 861 [REDACTED]  
[REDACTED]  
[REDACTED]

The Service instituted a § 6700/7408 investigation of [REDACTED]'s activities and also opened an examination of his Forms 1040. The Service has also opened an examination of [REDACTED]'s company.

[REDACTED] has informed the revenue agents in both the 1040 examination and the 6700 investigation that he intends to bring [REDACTED] to the interview. He stated in a letter to the revenue agent involved in the 6700 investigation, "[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED] . " He concluded with this statement: "

[REDACTED]

[REDACTED] . "

### Conclusions

1. The Service is not required to permit the news media (or any other persons) into an interview with a taxpayer even if the taxpayer requests it, if the Service determines that the presence of the news media (or other persons) might seriously impair tax administration under I.R.C. § 6103(c).

2. The Service is not required by statute or regulations to meet with an abusive tax shelter promoter in a section 6700/7408 investigation before sending the case to the Department of Justice; however, Rev. Proc. 83-78, 1983-2 CB. 595, which lays out procedures to be followed in a § 6700/7204 investigation, provides for a meeting with the taxpayer.

### Discussion

1. [REDACTED] has consented to the disclosure of his tax information to [REDACTED] and a number of other people. His intent is to create a public forum out of his meetings with the Service. The purpose of the Service in offering a meeting with a taxpayer, specifically [REDACTED], is to determine the facts concerning [REDACTED]'s tax liability and his abusive tax shelter [REDACTED]. We believe that there may be reason for you to find that the attendance of [REDACTED] and other persons at the meeting will not aid the Service in determining facts concerning [REDACTED]'s tax liability or promoter activity. It could certainly be concluded that attendance of these people will seriously impair Federal tax administration.

I.R.C. § 6103(c) which addresses disclosure of returns and return information to designees of a taxpayer provides:

The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return

information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

The statute says that the Service "may" disclose information, i.e., permit disclosure. It does not mandate disclosure. The last sentence states that return information "shall" not be disclosed. The last sentence mandates that the Service deny disclosure of taxpayer information if such disclosure would seriously impair Federal tax administration.

It is evident from [REDACTED]'s letter to the revenue agent that he intends to make any meetings with the Service a public forum in which he will present and argue his § 861 position. He has consented to have [REDACTED] and its camera crew plus his attorneys and accountants in the meeting in order to publicize his scheme. He will be focused on his performance in front of the [REDACTED] camera and the American public, not his tax liability or tax shelter investigation.

Video recordings have never been permitted at an interview with a taxpayer and the Service. A taxpayer has no legal right to make a video recording of his meeting with the Service. The Service's refusal to permit videotaping of an interview does not violate a taxpayer's Fifth Amendment due process rights. United States v. Black, 804 F.2d 1416 (8<sup>th</sup> Cir. 1986).

The Service's position to deny requests to videotape or otherwise film examination proceedings is that due to the increasing incidents of harassment and acts of violence directed at IRS agents and their families, particularly by militant tax challenged taxpayers, creation of a videotape record, where no safeguards exist to assure the ultimate uses to which it might be put, constitutes an unacceptable risk for IRS employees. A video record can be easily circulated and shown, thus subjecting agents to increased hazards far beyond the tactics now being employed to hamper the collection of revenue. The legitimate interest of the Service in protecting the identity of its agents has been recognized by the courts. For example, in May v. IRS, 50 AFTR2d 82-5231 (W.D. Mo. 1982), the court held that the video portion of an instructional video recording was not subject to release under the Freedom of Information Act as to do so could subject Service

personnel appearing in the video to harassment and threats by tax challenged taxpayers. In addition, videotaping of interviews tends to be unnecessarily disruptive of the interview process and generally does not give a witness any better record of the proceedings.

More importantly, a taxpayer has no right to have the Service disclose taxpayer's information to any person other than his power of attorney, if the Service finds that such disclosure would seriously impair Federal tax administration. In summary, we recommend that if you determine that disclosure of [REDACTED]'s tax information to [REDACTED], attorneys, CPAs, and other witnesses will seriously impair Federal tax administration, then [REDACTED]'s request to disclose tax information to these people should be denied.

2. The Service is not required by statute or regulations to meet with an abusive tax shelter promoter before sending the case to the Department of Justice for a § 6700 or § 7408 action. However, Rev. Proc. 83-78, 1983-2 C.B. 5951, which lays out procedures to be followed in a § 6700 or § 7408 investigation, provides for a meeting with the taxpayer during the promoter investigation.

Revenue procedures confer no legal rights upon the taxpayer. Agencies are not required, at the risk of invalidation of their action to follow all of their rules, even those properly classified as "internal." United States v. Caceres, 440 U.S. 741 (1979).

Revenue procedures generally have been held to fall into a class of general statements of policy and rules governing internal agency operations or housekeeping matters which do not have the force and effect of law, are not binding on the agency issuing them, and do not create substantive rights in the public. The Court in Capital Federal Savings & Loan v. Commissioner, 96 T.C. 204 (1991) stated that revenue procedures generally have been held to fall into a class of nonbinding rules, and courts have refused to invalidate the Commissioner's determinations arising out of his failure to abide by them. "Statements concerning the exercise of discretion which are issued solely for the guidance of the Commissioner's agents and employees, and which are not intended to be relied upon by the public in conducting its affairs, have not been and continue not to be binding on the Commissioner." Id. at 217.

In Bridges v. Commissioner, T.C. Memo. 1983-763, the Court stated that it was well-established law that procedural rules, such as those set forth in revenue procedures, are merely

directory and not mandatory and that failure to comply with a requirement contained therein will not render the action of respondent invalid.

Revenue Procedure 83-73 appears to have been issued solely for the guidance of the Commissioner's agents and employees and was not intended to be relied upon by the public in conducting its affairs.

In summary, the Courts hold that the Service is not legally required to follow its revenue procedures. The issue then becomes whether the Service should comply with its revenue procedures even though it is not legally required to do so. Generally, we would recommend that the Service follow its own revenue procedures. However, under the facts and circumstances of this case, we believe that there may be reason for you to weigh the consequences of ignoring the revenue procedure against the consequences of following the Revenue Procedure with respect to [REDACTED]'s meeting. According to [REDACTED]'s letter and his remarks to the revenue agent, he has no intention to provide books, records, or documents requested; he intends to make the meeting a public forum in which he will debate his scheme with the revenue agent; and he intends to have the media and others accompany him to the meeting. At this point you might consider whether a meeting with [REDACTED] would impair Federal tax administration. (See Issue 1).

Rev. Proc. 83-78, describes the program implemented by the Service to identify and investigate abusive tax shelter promotions, Sec. 4, which deals with the Revenue Agent's responsibility, states:

4.02 The Service will advise the promoter by letter that it is considering possible penalties and/or injunction action under sections 6700 and 7408 of the Code for promoting an abusive tax shelter. In addition, the Service will advise the promoter that it is considering the issuance of pre-filing notification letters to the investors in the promotion. The letter to the promoter will request a list of documents (including investor information), books, and records that the promoter must make available for examination within 10 days. The letter will also advise the promoter that if, after examination of the promoter's books and records, and/or third party information, the Service concludes that penalty, injunction or pre-filing notification action is appropriate, the promoter will be afforded the opportunity of a meeting to present any facts or legal arguments that the promoter believes

indicate that action should not be taken. Failure to provide the information and documentation requested in the letter may result in summonses being issued.

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4.04 Based upon an examination of the promotional material, the promoter's books and records and/or third party information, the revenue agent and the attorney will determine whether there is a basis for concluding that the investors will not be in compliance with the tax laws if they claim the tax benefits represented by the promoter to be available. At this time, the promoter will be offered an opportunity to meet with the revenue agent and the attorney.

In the instant case, the revenue agent has issued an Information Document Request and Letter 1844 (Notice of Commencement of I.R.C. § 6700 examination) to [REDACTED]. The letter scheduled a meeting with [REDACTED] on [REDACTED]. It states:

We have reviewed certain materials with respect to your tax shelter promotion. We are considering possible action under Section 6700 and 7408 of the Internal Revenue Code relating to penalties and an injunction action for promoting abusive tax shelters. In addition, we plan to consider issuing "pre-filing notification" letters to the investors who have invested in this promotion.

You are requested to meet with the examiner at the above date and time at our office. Enclosed is a list of documents, books and records that you should have available and questions you should be prepared to reply to at that time.

If we conclude that penalties, injunction, and/or "pre-filing notification" action is appropriate, you will be afforded an opportunity to present any facts or legal arguments that you feel indicate that such action should not be taken.

[REDACTED] has responded to the letter by informing the revenue agent that he intends to bring [REDACTED], attorneys, CPAs, and "normal witnesses" to the meeting.

It appears from [REDACTED]'s letter that he does not understand the purpose of the meeting scheduled for [REDACTED]. The meeting scheduled is solely for the purpose of producing [REDACTED]'s books, records, and documents listed in the IDR. If, after

examination of the [REDACTED]'s books and records and/or third party information, the Service concludes that § 6700 or § 7408 action is appropriate, then [REDACTED] will be afforded the opportunity of a meeting to present facts and law to support his position. The case can be referred to the Department of Justice after [REDACTED] is afforded an opportunity to present facts and law to support his position.

If you decide to follow the procedures in Rev. Proc. 83-78, then [REDACTED] should be informed that the meeting on [REDACTED], is solely for the purpose of production of the books, documents, and records requested in the IDR; it will not be a meeting at which he will be afforded an opportunity to present facts and legal arguments; and that after the Service has examined the books, documents, and records requested in the IDR and the Service concludes that penalties, injunction, and/or "prefiling notification" action is appropriate, a meeting will be arranged in which he may present any facts or law that support his position. [REDACTED] should be given a copy of Rev. Proc. 83-78.

We recommend that you consider offering [REDACTED] a meeting at which he may present the facts and legal arguments that he believes indicate that action should not be taken against him and make it clear to him that you are there to listen and not to debate or answer his questions. We also recommend that you consider informing [REDACTED] that only he and his power of attorney will be permitted to attend the meeting.

If you have any questions concerning this memorandum, please contact Senior Attorney Judith Winkler at (904) 232-2788, ext. 23.

J. MICHAEL MELVIN  
Associate Area Counsel  
(Small Business/Self-Employed)

By: \_\_\_\_\_  
JUDITH C. WINKLER  
Senior Attorney (SBSE)